

This Is (Not) Who We Are: *Korematsu*, Constitutional Interpretation, and National Identity

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ABSTRACT. This Essay argues that we are at a critical moment in the project of constitutional interpretation. Our choice to expand or contract our notion of rights implicates our survival as a species, as growing wealth inequality, globalized neofascism, and climate chaos loom. Asserting the continued usefulness of legal claims, the author asks a critical race theorist's question: what would it really take to overturn *Korematsu* and end structures of subordination? *Korematsu* is seen as a failed equal protection case: under the wartime pressures, the Court abandoned its role as a protector of minorities. It is also possible to read *Korematsu* more broadly as a due process case. The core of due process is liberty, and the *Korematsu* Court's failure to protect the basic human rights of Japanese Americans was a failure of substantive due process. The Court could not see the assault on basic human dignity when thousands of human beings were rounded up like cattle and shipped off to the desert. A true overruling of *Korematsu* would respond to the broader neofascist threat with a generative interpretation of our Constitution to uphold the inherent dignity of all human beings. This would not only outlaw the incarceration of immigrant children and end the "Muslim ban" — it would also introduce a notion of positive liberty to our interpretation of the Bill of Rights, ending the entire project of organizing political life around grabbing, smashing, and dominating.

INTRODUCTION

We are charged with the task of witness in these, the most perilous of times. We should watch and commit to memory what we see, because from this cauldron of hate and unprecedented resistance to hate we will emerge in a new reality, either immersed in exultant acknowledgement of our shared humanity or descended into one of fascism's many hells.

I write because I know where I intend to end up. As this Essay goes to press, bear witness: a white supremacist, who believed Jews are funding immigrant

hordes to take over “his” country, brought a weapon of war to Shabbat services.¹ In the days following the carnage at the Tree of Life synagogue, young people were arrested sitting shiva in the streets, demanding that their government denounce white supremacy.² Days earlier, a white supremacist sent pipe bombs to Black and Jewish targets,³ and another attempted a slaughter at a Black church in Kentucky.⁴ When foiled, the Kentucky shooter moved on to kill Black

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1. See Campbell Robertson et al., *Quiet Day at a Pittsburgh Synagogue Became a Battle to Survive*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/pittsburgh-synagogue-shooting.html> [<https://perma.cc/BK3R-SL6F>] (reporting a mass shooting at a synagogue in Pittsburgh, where eleven people were killed and six were injured by suspected gunman Robert Bowers, who, upon surrendering, told the police “all these Jews need to die”); Julie Terkewitz & Kevin Roose, *Who Is Robert Bowers, the Suspect in the Pittsburgh Synagogue Shooting?*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/robert-bowers-pittsburgh-synagogue-shooter.html> [<https://perma.cc/KJ29-JQJ5>] (noting that Bowers consistently expressed anti-Semitic and racist views on social media, including, “Jews are the children of Satan,” and that just before entering the synagogue, Bowers posted, “I can’t sit by and watch my people get slaughtered. Screw your optics, I’m going in”).
 2. See Noah Goldberg & Thomas Tracey, *Jewish Advocates Arrested During Sit-in at New York Metropolitan Republican Club, Demanding an End to White Nationalism*, N.Y. DAILY NEWS (Oct. 30, 2018), <http://www.nydailynews.com/news/national/ny-metro-sit-in-gop-club-20181030-story.html> [<https://perma.cc/C6T7-7GCB>] (reporting that the activists who were arrested outside of the New York Metropolitan Republican Club were sitting shiva for the victims of the Pittsburgh synagogue shootings); Taly Krupkin, *Fourteen Jews Arrested in N.Y. Protest Calling on Republicans to Denounce White Nationalism*, HAARETZ (Oct. 31, 2018), <https://www.haaretz.com/us-news/.premium-fourteen-arrested-in-new-york-protest-calling-on-gop-to-denounce-white-nationalism-1.6611195> [<https://perma.cc/A5UA-YLBU>] (reporting the arrest of fourteen young Jewish activists).
 3. See Patricia Mazzei et al., *Living in a Van Plastered with Hate, Bombing Suspect Was Filled with Right-Wing Rage*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/us/cesar-sayoc-bombing-suspect-arrested.html> [<https://perma.cc/3K7F-GPPN>] (reporting the online behavior and van description of the mail bombing suspect Cesar Sayoc, who, on social media, repeatedly “lashed out at immigrants, gun control advocates, and prominent Democratic politicians,” and whose van displayed stickers supporting President Trump and others that placed targeting crosshairs over the images of prominent Democratic politicians); Matt Zapotosky et al., *Who Is Cesar Sayoc? What We Know About the Suspected Mail Bomber Arrested in Florida*, WASH. POST (Oct. 26, 2018), <https://www.washingtonpost.com/nation/2018/10/26/who-is-cesar-altieri-sayoc-what-we-know-about-suspected-mail-bomber-arrested-florida> [<https://perma.cc/44XV-LLVV>] (reporting that a former colleague described Sayoc as “very angry and angry at the world, at blacks, Jews, gays,” and adding that Sayoc said, “if I had complete autonomy none of these gays or these blacks would survive”).
 4. See Karen Zraick & Matt Stevens, *Kroger Shooting Suspect Tried to Enter Black Church Before Killing 2 in Kentucky, Police Say*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/us/louisville-kroger-shooting.html> [<https://perma.cc/D68K-Z4M4>] (reporting the murder of two Black shoppers, Maurice E. Stallard and Vickie Lee Jones, by suspected white supremacist Gregory Bush at a Kroger supermarket in Jeffersontown, Kentucky). The gunman attempted to enter a predominantly Black church minutes before carrying out the murders. *Id.*

shoppers at a Louisville grocery store.⁵ Nazis are shooting at us while we await state condemnation of white supremacists, and immigrant bashing is the diversionary tactic of choice deployed by the new authoritarians.

Bear witness: we saw children torn from their parents by the thousands at the border;⁶ babies incarcerated;⁷ toddlers appearing alone at legal hearings;⁸ children held in cages;⁹ children dying in custody;¹⁰ psychotropic drugs and

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5. See *id.*
 6. See Associated Press, *With Thousands of Children Still Separated, Deadline to Reunite Immigrants Quickly Approaching*, CBS NEWS (July 6, 2018), <https://www.cbsnews.com/news/with-thousands-of-children-still-separated-deadline-to-reunite-immigrants-quickly-approaching> [<https://perma.cc/29BX-3V3R>] (“Trump administration officials have said 2,342 children were separated from 2,206 parents between May 5 through June 9. Mr. Trump’s order stopped separations on June 20.”).
 7. See Garance Burke & Martha Mendoza, *At Least 3 “Tender Age” Shelters Set up for Child Migrants*, ASSOCIATED PRESS (June 20, 2018), <https://apnews.com/dc0c9a5134d14862ba7c7ad9a811160e> [<https://perma.cc/XG3U-2RPV>] (“The Trump administration has set up at least three ‘tender age’ shelters to detain babies and other young children who have been forcibly separated from their parents at the U.S.-Mexico border . . . Many of [the children] are under age 5, and some are so young they have not yet learned to talk.”).
 8. See Christina Jewett & Shefali Luthra, *More Toddlers Appear Alone in Court for Deportation Under Family Separation*, PBS NEWSHOUR (June 28, 2018), <https://www.pbs.org/newshour/health/more-toddlers-appear-alone-in-court-for-deportation-under-family-separation> [<https://perma.cc/GY4Y-DCX2>] (“As the White House faces court orders to reunite families separated at the border, immigrant children as young as 3 are being ordered into court for their own deportation proceedings.”).
 9. See Nomaan Merchant, *Immigrant Kids Seen Held in Fenced Cages at Border Facility*, ASSOCIATED PRESS (June 18, 2018), <https://apnews.com/6e04c6ee01dd46669eddba9d3333f6d5> /Immigrant-kids-seen-held-in-fenced-cages-at-border-facility [<https://perma.cc/R6J6-ZMU4>] (“Inside an old warehouse in South Texas, hundreds of immigrant children wait in a series of cages created by metal fencing. One cage had 20 children inside. Scattered about are bottles of water, bags of chips and large foil sheets intended to serve as blankets.”).
 10. See Michael Brice-Saddler, *The 7-Year-Old Girl Who Died in Border Patrol Custody Was Healthy Before She Arrived, Father Says*, WASH. POST (Dec. 15, 2018), <https://www.washingtonpost.com/nation/2018/12/15/year-old-girl-who-died-border-patrol-custody-was-healthy-before-she-arrived-father-says> [<https://perma.cc/MZX5-LAZB>] (reporting the death of seven-year-old Jakelin Caal, who died of shock and dehydration after being taken into Border Patrol custody); Joel Rose, *A Toddler’s Death Adds to Concerns About Migrant Detention*, NPR (Aug. 28, 2018, 7:16 PM ET), <https://www.npr.org/2018/08/28/642738732/a-toddlers-death-adds-to-concerns-about-migrant-detention> [<https://perma.cc/FQK6-9SCH>] (telling the story of Mariee Juárez, an eighteen-month-old toddler who died after being detained at the South Texas Family Residential Center).

sexual abuse handed out to children¹¹ at private prisons we paid for.¹² We witnessed, and many said as loudly as they could: “This is *not* who we are.”¹³ Even

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11. In July 2018, a federal district court judge ordered a shelter for detained immigrant children to stop forcibly administering psychotropic drugs. Order Re Plaintiffs’ Motion to Enforce Class Action Settlement at 23, *Flores v. Sessions*, 2:85-cv-04544-DMG-AGR (C.D. Cal. July 30, 2018) (ordering defendants to comply with all Texas child welfare laws and regulations governing the administration of psychotropic drugs to children at Shiloh Residential Treatment Center); Memorandum in Support of Motion to Enforce Class Action Settlement at 12-14, *Flores*, 2:85-cv-04544-DMG-AGR (C.D. Cal. Apr. 16, 2018) (quoting the testimony of detained children, who said that they were forced to take multiple medications, often without being told what the pills were or why they were being administered); see also Aura Bogado et al., *Migrant Children Sent to Shelters with Histories of Abuse Allegations*, REVEAL NEWS (June 20, 2018), <https://www.revealnews.org/article/migrant-children-sent-to-shelters-with-histories-of-abuse-allegations> [<https://perma.cc/YZ27-NY2A>] (describing numerous serious allegations of lapses in care by private companies operating immigrant youth shelters, including neglect and sexual and physical abuse, and telling the story of a Honduran asylum seeker whose son was housed at a treatment center for nearly six months while she awaited her asylum hearing, where he was administered psychotropic drugs over his mother’s repeated objections); Ari Honarvar, *A 6-Year Old Girl Was Sexually Abused in an Immigrant-Detention Center*, NATION (July 27, 2018), <https://www.thenation.com/article/six-year-old-girl-sexually-abused-immigrant-detention-center> [<https://perma.cc/5PQQ-SWJ8>] (reporting that a six-year-old girl separated from her mother under the Trump Administration’s “zero-tolerance” immigration policy was sexually abused while at an Arizona detention facility run by Southwest Key Programs, then asked “to sign a form acknowledging that she was told to maintain her distance from her alleged abuser, who is another child being held at the same detention facility”). The neglect and abuse of detained children has been widely documented by organizations like the American Civil Liberties Union. See, e.g., Int’l Human Rights Clinic et al., *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection*, U. CHI. L. SCH. 11 (May 2018), https://www.dropbox.com/s/lplnnufjbcioxn/CBP%20Report%20ACLU_IHRC%205.23%20FINAL.pdf [<https://perma.cc/YSP8-8ZS6>] (describing many abuses, including an incident involving a sixteen-year-old boy who “recounted that a Border Patrol agent threw him down and smashed his head into the ground with his boot,” then told the child that he would “fuck [him] up” if he tried to run away). Advocates are also concerned about the absence of any photos of detained young girls or the facilities they are detained in. See Abby Vesoulis, *Advocates Worry About Girls Held Due to Family Separation Policy*, TIME (June 19, 2018), <http://time.com/5316116/family-separation-policy-girls> [<https://perma.cc/FR7E-GX4M>] (“The Trump Administration has released photos of young boys being held at detention centers for undocumented immigrants, but so far it has not released any images of young girls.”).
12. For a brief description of recent government spending on contracts with private contractors for immigrant detention facilities, see John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017, 5:00 AM ET), <https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom> [<https://perma.cc/V6Q6-2TU3>], which notes, “Back in Conroe, Texas, a second GEO [Group] jail is now under construction. That facility will house 1,000 inmates at a cost to taxpayers of at least \$44 million per year.”
13. See Thomas J. Donohue, *Separating Children from Families Must End Now*, U.S. CHAMBER COM. (June 19, 2018), <https://www.uschamber.com/series/above-the-fold/separating-children>

an administration that first argued for the deterrent value of child separation¹⁴ retreated when outrage came from within the Republican Party.¹⁵

“This is not who we are” was useful rhetoric, appealing to common decency and the instinctual imperative to care for children.¹⁶ Mainstream organizations like the American Academy of Pediatrics stepped up, as though entering a public-policy ER.¹⁷ The doctors explained that sudden separation from trusted adults

-families-must-end-now [https://perma.cc/HY9M-RKCN] (“[T]his is not who we are and it must end now. Policymakers in Washington are accustomed to hearing the U.S. Chamber of Commerce opine about the economics of particular policies. But public policy is often also a reflection of a nation’s values.”); *The Forcible Separation of Migrant Children from Their Parents Is an American Disgrace*, L.A. TIMES (May 6, 2018), <http://www.latimes.com/opinion/readersreact/la-ol-le-children-parents-immigration-separation-20180506-story.html> [https://perma.cc/6FXM-87JB]; Kristine Phillips, ‘America Is Better than This’: What a Doctor Saw in a Texas Shelter for Migrant Children, WASH. POST (June 16, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/06/16/america-is-better-than-this-what-a-doctor-saw-in-a-texas-shelter-for-migrant-children> [https://perma.cc/5UGS-B2KP].

14. In a speech on June 18, 2018, former Attorney General Jeff Sessions stated: “We cannot and will not encourage people to bring children by giving them blanket immunity from our laws.” Att’y Gen. Jeff Sessions, Address at the National Sheriffs’ Association Annual Conference (June 18, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-sheriffs-association-annual> [https://perma.cc/XW53-5RYF]; see also Att’y Gen. Jeff Sessions, Address at the Annual Joint Conference of the Montana Association of Chiefs of Police and Montana Police Protective Association (June 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-24th-annual-joint-conference-montana> [https://perma.cc/BG39-EZG4] (“I hope that we don’t have to separate any more children from any more adults. But there’s only one way to ensure that is the case: it’s for people to stop smuggling children illegally. Stop crossing the border illegally with your children. Apply to enter lawfully. Wait your turn.”).
15. See *Affording Congress an Opportunity to Address Family Separation*, Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 25, 2018). Among prominent Republicans who decried the policy were Paul Ryan, Jeb Bush, and Laura Bush. See Billy Perrigo, *Here Are All the Republicans Who Criticized the Trump Administration’s Family Separation Policy this Weekend*, TIME (June 18, 2018), <http://time.com/5314681/republicans-criticized-trump-family-separation-border> [https://perma.cc/KF4L-Z64X].
16. See Phillips, *supra* note 13 (quoting Colleen Kraft, the president of the American Academy of Pediatrics, as saying, “[t]he really basic, foundational needs of having trust in adults as a young child [are] not being met. That contradicts everything we know that the kids need to build their health”); see also Senator Dick Durbin (@SenatorDurbin), TWITTER (June 13, 2018), <https://twitter.com/SenatorDurbin/status/1006974920532914176> [https://perma.cc/BK3U-8WCB] (“Removing a child from the arms of a mother, with no suspicion of wrongdoing, isn’t consistent whatsoever with who we are as a nation. This family separation policy is not America.”).
17. The official policy of the American Academy of Pediatrics strongly advises against detaining migrant children separately from their parents:

It is the position of the [American Academy of Pediatrics] that children in the custody of their parents should never be detained, nor should they be separated from a parent, unless a competent family court makes that determination. In every

may inflict permanent neurological injury, particularly in the youngest children, and we received lessons on toxic stress and synapse destruction along with our daily news.¹⁸ Faced with the growing consensus that harming children was a national outrage, the Trump Administration backed down¹⁹ and a court order, still not effectuated, commanded the return of children to their parents.²⁰ Good citizens rejoiced: infliction of trauma on children is not who we are.

decision about children, government decision-makers should prioritize the best interests of the child.

Julie M. Linton et al., *Detention of Immigrant Children*, 139 PEDIATRICS 1, 7 (2017); see Letter from Colleen A. Kraft, President, Am. Acad. of Pediatrics, to Kirstjen M. Nielsen, U.S. Sec’y of Homeland Sec. (Mar. 1, 2018), <https://downloads.aap.org/DOFA/AAP%20Letter%20to%20DHS%20Secretary%2003-01-18.pdf> [<https://perma.cc/YQT3-ER9J>] (“In our previous letter, the Academy urged you in the strongest possible terms to reject a policy that would separate children from their parents at the border . . . We write to implore you to intervene with immigration enforcement and put an end to the separation of parents and children.”).

18. See Colleen Kraft, *Separating Parents from Their Kids at the Border Contradicts Everything We Know About Children’s Welfare*, L.A. TIMES (May 3, 2018), <http://www.latimes.com/opinion/op-ed/la-oe-kraft-border-separation-suit-20180503-story.html> [<https://perma.cc/SS9P-TZFR>]; Laura Santhanam, *How the Toxic Stress of Family Separation Can Harm a Child*, PBS NEWSHOUR (June 18, 2018), <https://www.pbs.org/newshour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child> [<https://perma.cc/F4KT-2EXR>] (detailing the toxic stress response and its biological consequences, including inhibited brain development, emotional difficulties, and increased likelihood of behavioral problems, substance abuse problems, and chronic physical illnesses like diabetes and heart disease); see also Mark P. Mattson & Dong Liu, *Energetics and Oxidative Stress in Synaptic Plasticity and Neurodegenerative Disorders*, 2 NEUROMOLECULAR MED. 215 (2002) (discussing how increased levels of stress place the synapses of nerves at risk of neurodegenerative disorders). See generally Linton, *supra* note 17 (noting that the unique medical and developmental needs of children are hurt by the family separation policy).
19. See Exec. Order No. 13841, 83 Fed. Reg. 29435.
20. As of August 16, 2018, approximately 565 children remained separated from their families. See *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (stopping the Trump Administration from separating children from their parents at the border and ordering reunification of all families already separated within thirty days); Joint Status Report at 2, *Ms. L.*, 310 F. Supp. 3d 1133 (joint status report of the parties on the status on reunification of families with children under eighteen); see also Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children than Reported*, N.Y. TIMES (Jan. 17, 2019) <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> [<https://perma.cc/S44X-GRNA>] (reporting that, as of November 2018, the Department of Health and Human Services had received at least 118 children after the reunification order was entered, and that “the list of families entitled to reunification was still being revised as late as December 2018, more than five months after the court order took effect”); Miriam Jordan, *Trump Administration Says It Needs More Time to Reunite Migrant Families*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/migrant-children-court-families.html> [<https://perma.cc/38V3-KS6R>] (reporting that the Trump Administration asked the court for more time to reunite migrant families separated by authorities at the southwest border).

In the hallways of Black Twitter, however, this rhetoric met its skeptical sisters.²¹ “Oh yes, this is exactly who we are,” the “sisters” said. What was the auction block, where children were sold like livestock while mothers moaned in agony?²² What was the genocide of Native Americans,²³ the napalming of babies in Vietnam,²⁴ the official indifference to police violence that terrorizes Black

and that, according to some of those working on family reunifications, records connecting children to their parents in some cases have “disappeared”).

21. See, e.g., Sherrilyn Ifill (@Sifill_LDF), TWITTER (June 5, 2018, 6:11 PM), https://twitter.com/Sifill_LDF/status/1004214111801049089 [<https://perma.cc/MH3K-GV9U>] (“I love everything Sen @JeffMerkley is doing to address this travesty. But I reject the idea that this ‘is not who we are as a country.’ Sadly, this is who we are.”); @prisonculture, TWITTER (June 12, 2018, 3:10 PM), <https://twitter.com/prisonculture/status/1006705331546808320> [<https://perma.cc/T8ZU-HZ4X>] (“Sadly we’re exactly as we’ve always been. We’re the country that inter[n]ed thousands of Japanese Americans and have over 2.2 million people currently imprisoned. So this is us.”); Dorothy Roberts (@DorothyERoberts), TWITTER (July 12, 2018, 4:25 AM), <https://twitter.com/DorothyERoberts/status/1017414610733785088> [<https://perma.cc/G37Q-K89Q>] (“I hope the important media attention to trauma caused by separating children from their parents at the border will get people to see the trauma caused when black children are taken from their parents & placed in foster care. It’s routinely ignored by experts and state agents.”).
22. See IRA BERLIN, *GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES* 215-16 (2003) (recounting slave auctions, where “even the youngest children appreciated the ominous implications of sale” and enslaved mothers dreaded returning to work for fear that their children would be taken and sold while they were away); RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN 19TH-CENTURY AMERICA* 44 (1990) (describing how slaveowner Thomas Jefferson chose and bred human beings in order to maximize profit); see also DeNeen L. Brown, ‘Barbaric’: America’s Cruel History of Separating Children from Their Parents, *WASH. POST* (May 31, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents> [<https://perma.cc/6X5E-RPWW>] (comparing America’s history of breaking apart Black families through slavery and separating Native American children from their parents to the present U.S. policy of separating immigrants and refugees from their parents at the border).
23. See M. Annette Jaimes, *Sand Creek: The Morning After*, in *THE STATE OF NATIVE AMERICA* 1, 1-3 (M. Annette Jaimes ed., 1992) (describing how hundreds of massacres of Native Americans were committed, including those at Bear River and Sand Creek); Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in *THE STATE OF NATIVE AMERICA*, *supra*, at 23, 34-36 (“By the mid-19th century, U.S. policymakers and military commanders were stating—openly, frequently . . . that their objective was . . . ‘the complete extermination’ of . . . [native people].”); see also Richard Delgado & Juan F. Perea, *Racial Templates*, 112 *MICH. L. REV.* 1133, 1135 (2014) (recalling how it was “easy” for some to view the need to wage war against Mexico as an extension of the destruction of natives in America, who were portrayed as lesser humans).
24. See DENISE CHONG, *THE GIRL IN THE PICTURE: THE KIM PHUC STORY* 63-65 (1999) (describing a famous photo taken by Nick Ut that depicts women, children, and babies burned to death by a napalm attack in Vietnam; “[N]apalm ignited in a fierce explosive splash across the highway . . . An old lady, her face torn with anguish, struggled forward with the limp weight of a child’s naked, blackened body in her arms. [W]ith every flat-footed step charred skin flapped or fell from the child’s limbs”).

families,²⁵ the rise of white supremacist murders,²⁶ and a sitting President who refuses to condemn Nazis.²⁷

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25. See generally *POLICE BRUTALITY: AN ANTHOLOGY* (Jill Nelson ed., 2000) (addressing the prevalence of police brutality in the lives of Black Americans past and present).
26. According to the Anti-Defamation League, white supremacist murders more than doubled in 2017. See *White Supremacist Murders More Than Double in 2017*, ANTI-DEFAMATION LEAGUE (2018), <https://www.adl.org/news/press-releases/adl-report-white-supremacist-murders-more-than-doubled-in-2017> [<https://perma.cc/X5AU-7KCZ>] (“[W]hite supremacists and other far-right extremists were responsible for 59 percent of all extremist-related fatalities in the U.S. in 2017, up dramatically from 20 percent in 2016.”); see also DAVID NEIWERT, *ALT-AMERICA: THE RISE OF THE RADICAL RIGHT IN THE AGE OF TRUMP* (2017) (describing the increase in nationalist ideology and actions in the United States following the announcement of the presidential campaign of Donald Trump); Ctr. for the Study of Hate & Extremism, *Final U.S. Status Report: Hate Crime Analysis & Forecast for 2016/2017*, CAL. ST. U. SAN BERNARDINO (Sept. 2017), https://csbs.csusb.edu/sites/csusb_csbs/files/Final%20Hate%20Crime%2017%20Status%20Report%20pdf.pdf [<https://perma.cc/6D5X-7J86>] (providing statistics of hate crimes in major U.S. cities); Jonathan Greenblatt, *The Resurgent Threat of White-Supremacist Violence*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-resurgent-threat-of-white-supremacist-violence/550634> [<https://perma.cc/2J6F-VZUX>]. For examples of white supremacist shootings and murders, see *supra* notes 1 and 4, which describe the Louisville and Pittsburgh murders. For other examples of white-supremacist crimes, see Lizette Alvarez & Alan Blinder, *Recalling Nine Spiritual Mentors, Gunned Down During Night of Devotion*, N.Y. TIMES (June 18, 2015), <https://www.nytimes.com/2015/06/19/us/nine-victims-of-charleston-church-shooting-remembered.html> [<https://perma.cc/DV5N-BBSA>], which remembers the nine victims of the Charleston Church shooting, including Tywanza Sanders, Clementa C. Pinckney, and Susie Jackson; Ellen Barry, *Officials in U.S. and India Condemn Shooting of Sikh Man in Washington State*, N.Y. TIMES (Mar. 5, 2017), <https://www.nytimes.com/2017/03/05/world/asia/sikh-shooting-washington-state.html> [<https://perma.cc/YY54-XPUB>], which reports the attempted murder of Deep Rai, who was on his property when a masked man confronted him and said “go back to your own country” before shooting him; Matthew Haag & Jacey Fortin, *Two Killed in Portland While Trying to Stop Anti-Muslim Rant, Police Say*, N.Y. TIMES (May 27, 2017), <https://www.nytimes.com/2017/05/27/us/portland-train-attack-muslim-rant.html> [<https://perma.cc/X9LG-WAD9>], which reports the murders of Ricky John Best and Taliesin Myrddin Namkai Meche, who came to the aid of two Muslim American women, by Jeremy Christian after he began yelling that Muslims are criminals; Joe Helm & Kristine Phillips, *Self-Professed Neo-Nazi James A. Fields Jr. Convicted of First-Degree Murder in Car-Ramming that Killed One, Injured Dozens*, WASH. POST (Dec. 7, 2018), https://www.washingtonpost.com/local/public-safety/jury-set-to-begin-deliberations-in-james-a-fields-jr-car-ramming-trial/2018/12/06/65d38748-f9b3-11e8-8c9a-860ce2a8148f_story.html [<https://perma.cc/7AUD-PKP7>], which reports the conviction of James Alex Fields Jr., “[a]n avowed supporter of neo-Nazi beliefs,” who killed Heather Heyer when he drove his car into a crowd of nonviolent anti-Nazi demonstrators; Justin Jouvenal, *A Teen Is Charged with Killing His Girlfriend’s Parents. They Had Worried He Was a Neo-Nazi*, WASH. POST (Dec. 23, 2017), https://www.washingtonpost.com/local/public-safety/teen-charged-with-killing-girlfriends-parents-they-had-worried-he-was-a-neo-nazi/2017/12/23/e2102894-e761-11e7-833f-155031558ff4_story.html [<https://perma.cc/DKN4-YXGS>], which reports that a neo-Nazi teenager killed his girlfriend’s parents in their Virginia home; William K. Rashbaum et al., *Outspoken Trump Supporter in Florida Charged in Attempted Bombing Spree*, N.Y. TIMES (Oct. 26, 2018),

This is the blood-red mark trailing the economic and political ascendancy of the United States: the nation's wealth and power derived from kidnapping, torture, murder, and plunder. I intend no overstatement. This is simple fact. Bodies crammed in the holds of slave ships were the drivers of economic growth, building fortunes in finance, shipping, insurance, and all the infrastructure required to treat humans as items of international trade.²⁸ Cotton and sugar, the

<https://www.nytimes.com/2018/10/26/nyregion/cnn-cory-booker-pipe-bombs-sent.html> [<https://perma.cc/P8A4-JMB8>], which reports on the fourteen explosive packages sent to critics of President Trump by suspect Cesar Altieri Sayoc, Jr.; Tony Rizzo, 'Get Out of My Country,' *He Said Before Shooting. He Pleads Guilty to Hate Crime*, KAN. CITY STAR (May 22, 2018, 7:39 AM), <https://www.kansascity.com/news/local/crime/article211576754.html> [<https://perma.cc/S2Y2-LKJA>], which reports the murder of Srinivas Kuchibhotla, in which Adam Purinton demanded to know where Kuchibhotla was from, called him a terrorist among other racist epithets, and said "get out of my country," before killing Kuchibhotla; Kevin Sack & Alan Blinder, *Jurors Hear Dylann Roof Explain Shooting in Video: 'I Had to Do It'*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/us/dylann-roof-shooting-charleston-south-carolina-church-video.html> [<https://perma.cc/RTU2-WYWK>], which reports the mass shooting by a white supremacist at the Emanuel African Methodist Episcopal Church where nine members were killed in Charleston, North Carolina; and Brandy Zadrozny & Ben Collins, *New Mexico School Shooter Had Secret Life on Pro-Trump White Supremacy Sites*, DAILY BEAST (Dec. 15, 2017), <https://www.thedailybeast.com/new-mexico-school-shooter-had-secret-life-on-pro-trump-white-supremacy-sites> [<https://perma.cc/USB6-R8SG>], which reports the murder of two high school students by William Edward Atchison, who frequented and posted racist, hateful content on alt-right websites. *See also 2016 Hate Crime Statistics Released*, FBI (Nov. 13, 2017), <https://www.fbi.gov/news/stories/2016-hate-crime-statistics> [<https://perma.cc/GGX5-U4QY>] (summarizing reported hate crimes by category for 2016); Rosie Gray, *The Alt-Right's Rebranding Effort Has Failed*, ATLANTIC (Aug. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/08/alt-right-charlottesville/536736> [<https://perma.cc/F4T9-NBZ3>], which describes the Charlottesville riots, in which white supremacists flew confederate and Nazi flags and hundreds of torch-bearing white nationalists marched through the streets at night; and Keegan Hanks & Alex Amend, *The Alt Right Is Killing People*, S. POVERTY L. CTR. (Feb. 5, 2018) <https://www.splcenter.org/20180205/alt-right-killing-people> [<https://perma.cc/99PN-UZE8>], which reports on violence by the alt-right in America.

27. *See* Natasha Bertrand, *Neo-Nazis and White Supremacists Are Celebrating Trump's Remarks About the Charlottesville Riots*, BUS. INSIDER (Aug. 12, 2017), <https://www.businessinsider.com/neo-nazis-celebrate-trumps-remarks-about-charlottesville-riots-2017-8> [<https://perma.cc/2AX6-3QHB>] ("White nationalists and neo-Nazis celebrated President Donald Trump's remarks about the protests in Charlottesville, Virginia on Friday, in which he denounced violence 'on all sides' rather than explicitly condemning white supremacism.").
28. *See* Sven Beckert & Seth Rockman, *Introduction to SLAVERY'S CAPITALISM* 1, 1 (Sven Beckert & Seth Rockman eds., 2016) ("During the eighty years between the American Revolution and the Civil War, slavery was indispensable to the economic development of the United States . . . Only in the past several years has scholarship on finance, accounting, management, and technology allowed us to understand American economic development as 'slavery's capitalism.'"); *see also* SHARON ANN MURPHY, *INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA 184-206* (2010) (discussing at length the relationship between the slave trade and the life insurance trade in the pre-Civil War era); Joshua D. Rockman, *The Contours of Cotton*

commodities of growth, depended on slave labor, forced by the lash.²⁹ The red stain of which I speak is actual. I have known in my lifetime a woman whose grandmother bared her back so her grandchildren could see and touch the cross-hatch of scars left by the lash. This is living memory. It has touched many families for whom the thickened scars of the lash are a concrete reminder of America's raging cruelty.

Oh yes, this is indeed who we are. As the old sorrow song records, there are many thousands gone.³⁰ This Essay sinks into a half-lit space between the evil we are clearly capable of and the perpetual aspiration for a self-definition that precludes evil. It argues that the recent formal overruling of *Korematsu* will change nothing without a commitment to ending white supremacy in all its iterations, and more significantly, without reinterpreting our Constitution to promote the ability of each member of a beloved community to thrive. Our Constitution declares who we are, and, as presently interpreted, it fails to stand firmly against white supremacy. This Essay is a call to give deep substance to our notions of equality and due process at a historical juncture that presents interpretive choices implicating our actual chances of survival on a warming planet.

I. BOYLE HEIGHTS

Near the concrete banks of the L.A. River is a community that reflects the Los Angeles of my father's childhood: immigrants, corridos, amazing food,

Capitalism: Speculation, Slavery, and Economic Panic in Mississippi, 1832-1841, in *SLAVERY'S CAPITALISM*, *supra*, at 122, 122-23 (providing examples of financing through slave ownership).

29. For background on the United States' involvement in the cotton and sugar industries, see generally Edward E. Baptist, *Toward a Political Economy of Slave Labor: Hands, Whipping-Machines, and Modern Power*, in *SLAVERY'S CAPITALISM*, *supra* note 28, at 31, 54, which notes that, "From 16,000 metric tons in 1800, just 5 percent of world production, Cuba rapidly scaled up its production to half a million metric tons by the 1850s—50 percent of all the sugar made in the world"; Stephen Chambers, "No Country but Their Counting-Houses": *The U.S.-Cuba-Baltic Circuit, 1809-1812*, in *SLAVERY'S CAPITALISM*, *supra* note 28, at 195, 202-03, describing the increase in production in the Cuban sugar industry, which Americans invested in heavily; and Rockman, *supra* note 28, at 127, which notes that, "In 1834 Mississippians produced 85 million pounds of cotton, a more than eightfold increase over the amount they had produced less than fifteen years earlier . . . and by 1839 the Mississippi cotton crop amounted to nearly 200 million pounds."
30. See *No More Auction Block for Me*, in NORMAN LUBOFF & WIN STRACKE, *SONGS OF MAN: THE INTERNATIONAL BOOK OF FOLK SONGS* 304, 304 (1965) ("No more auction block for me, no more, no more. / No more auction block for me, many thousand gone."). The most famous version of this song was recorded by Paul Robeson as *No More Auction*, *No More Auction Block*, or *No More Auction Block for Me* and released as a track on several albums in the mid-1900s. See, e.g., PAUL ROBESON: ARTIST AND CITIZEN 117 (Jeffrey C. Stewart ed., 1998) ("In 1934 Robeson began including a general folk-song group in his concerts . . . Along with these came . . . militant early spirituals such as 'No More Auction Block For Me.'").

working people's parties in the backyards.³¹ My grandparents were worker-artist-intellectuals, who met with friends to study Marx and produce literary journals. Their home was humble, but it was filled with books and papers and art made by struggling Issei artists. La Boheme de Los Angeles, in Nihongo. I wish I had a few of their sketchbooks and political pamphlets from the International Labor Defense,³² and maybe a book or two. Most of all, I wish I had copies of the *Ryūkyū* journal,³³ with its essays and poems by both of my grandparents and my father. Not one piece of the family archive survived. When Japanese Americans were banished from the West Coast, sent first to the horse stalls at Santa Anita and then to the freezing scrubland at Heart Mountain, Wyoming, allowed to take only what they could carry in two hands,³⁴ the papers were left behind to make room for a coat, a blanket, a few clothes, in the traveling kit of the exile.

My father left a full 1940s teenage life. He was a track record holder, a JV football player, and an academic high achiever, pushed forward by a mother who made him take Latin in exchange for signing his sports permission slip. His friends were from all over the world, which is how I know that "Zionist" in 1930s Boyle Heights meant something quite different from what it means now,³⁵ and

31. See generally JAPANESE AM. NAT'L MUSEUM, IMAGES OF AMERICA: LOS ANGELES'S BOYLE HEIGHTS 20, 35 (2005) (illustrating the diversity, community, and intercultural interaction in Boyle Heights through photos and commentary); Wendy Elliott, *The Jews of Boyle Heights, 1900-1950: The Melting Pot of Los Angeles*, 78 S. CAL. Q. 1, 1-10 (1996).

32. The International Labor Defense is referred to as "a Communist-oriented leftist legal defense organization" in Charles H. Martin, *Communists and Blacks: The ILD and the Angelo Herndon Case*, 64 J. NEGRO HIST. 131, 132 (1979).

33. See generally OKINAWA CLUB OF AMERICA, HISTORY OF THE OKINAWANS IN NORTH AMERICA (HOKUBEI OKINAWAJIN SHI) 344 (Ben Kobashigawa trans., 1988) (discussing the *Ryūkyū* journal).

34. See generally COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 135-36 (1997) ("Baggage restrictions posed an immediate problem, for many evacuees did not know where they would be going. They could take only what they could carry, a directive that required much anguished sorting of a lifetime's possessions." (footnote omitted) (citing J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 100 (1943))); *id.* at 138-48 (describing the assembly centers, including the Santa Anita racetrack, where Japanese Americans were gathered before being sent to internment camps); *id.* at 156-59 (listing the capacity for holding Japanese American internees at each camp and describing generally the poor conditions at the Heart Mountain facilities).

35. As Caroline Elizabeth Luce wrote in her 2013 dissertation,

Because of the stridency of contemporary debates about Israel, the term "Jewish nationalism" has become widely associated with Zionism and Jewish statehood. But in order to understand nationalism in the way that the Yiddish-speaking Jews of Boyle Heights did, one must see the term as part of broader discussions among intellectuals in 19th century Europe about the legitimacy of imperial rule, the secularization of politics, natural rights and popular sovereignty.

that the Armenian genocide and ensuing diaspora turbocharged the academic rigor of the L.A. public schools as the children of refugee intellectuals joined the polyglot community.³⁶ My father's classmates—a rainbow of birthright citizens³⁷—knew he was no threat to national security, as did the U.S. Army when it gladly accepted him as a combat volunteer.

Every day of his youth, my father read the Hearst newspapers that told lie after lie about Japanese Americans: they were sneaky, greedy, mendacious, conniving to take things that belonged to real Americans and to destroy the American way of life.³⁸ What my father learned is that an ideology of dehumanization quickly devolves into acts of inhumanity. All the lofty language of due process and equal protection become just words on paper. The paper falls to the pavement, scatters in the wind, dematerializes in the gutter.

Caroline Elizabeth Luce, *Visions of a Jewish Future: The Jewish Bakers Union and Yiddish Culture in East Los Angeles, 1908-1942*, at 17 (2013) (unpublished Ph.D. dissertation, University of California, Los Angeles), <https://escholarship.org/uc/item/2z3643xz> [<https://perma.cc/N6DY-YC7L>].

36. Cf. JAPANESE AM. NAT'L MUSEUM, *supra* note 31, at 50 (including an image of Armenian community members in front of an Armenian Catholic church in Boyle Heights, which was "[e]stablished in the 1950s following increased immigration of Armenian Catholics after World War II"); Mari Matsuda, *Poem for Armenian Genocide Day and Rules for Postcolonials*, 13 J. ASIAN AM. STUD. 359, 362 (2010) (recounting the events of the Armenian genocide and describing how academics were rounded up and arrested in 1915); Matt Stromberg, *Survivors and Artists Memorialize the Armenian Genocide at a New Glendale Venue*, HYPERALLERGIC (2017), <https://hyperallergic.com/379605/survivors-and-artists-memorialize-the-armenian-genocide-at-a-new-glendale-venue> [<https://perma.cc/BES5-9AER>] (describing an art installation in Glendale, California, where Armenians make up as much as thirty-five percent of the population). For an overview of the Armenian genocide, see generally RONALD GRIGOR SUNY, "THEY CAN LIVE IN THE DESERT BUT NOWHERE ELSE": A HISTORY OF THE ARMENIAN GENOCIDE (2015).
37. My father and many of his classmates were the first in their families born in the United States and, as birthright citizens, made significant contributions on the battlefield and in public life as part of the so-called "Greatest Generation." The White House recently initiated an attack on the longstanding constitutional principle of birthright citizenship. See Alex Leary & Jess Bravin, *Trump Wants to Curb Birthright Citizenship, Escalating Immigration Debate*, WALL ST. J. (Oct. 30, 2018), <https://www.wsj.com/articles/trump-plans-executive-order-to-end-birthright-citizenship-in-u-s-1540901506> [<https://perma.cc/U84P-7ZZR>].
38. See generally JOHN DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 7, 157, 161 (1986); PERSONAL JUSTICE DENIED, *supra* note 34, at 37 ("[T]he Hearst newspapers in particular, promoted the fear. 'Patria,' produced by Hearst's International Film Service Corp. in 1917, and 'Shadows of the West,' circulated by the American Legion, both portrayed Japanese immigrants as sneaky, treacherous agents of a militaristic Japan seeking to control the West Coast." (footnotes omitted)); PERSONAL JUSTICE DENIED, *supra*, at 71, 166, 227 (describing multiple works of anti-Japanese propaganda published by Hearst during the period of Japanese internment).

Those words are nothing without our hearts behind them and citizens standing shoulder to shoulder, shouting “this is NOT who we are.”³⁹ Few objected as the train left to carry my father away from the city of his birth. When he left Heart Mountain to fight a fascist regime, his own mother waited behind barbed wire with no rights any court then cared to enforce.⁴⁰ Locking people up because they were the wrong race was, indeed, who we were, even as we battled the murderous regime of the self-proclaimed master race.

II. THIS IS WHAT IT LOOKS LIKE THE DAY BEFORE THE WORST OF NIGHTS

It is 1933. Victor Klemperer, a scholar of German literature and a true believer in its glories, has invited friends for coffee.⁴¹ Klemperer is an assimilated Jew,⁴² baptized Christian, married to an “Aryan” woman,⁴³ and devoted to the beautifully refined humanism he sees in German culture—his culture.⁴⁴ Klemperer

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39. Cf. DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 6 (2016) (“The argument of this book is that civil society groups play an equally important part in shaping constitutional law. At their best, they are the catalysts of constitutional change—the engines of liberty.”); Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community*, 114 *YALE L.J.* 1353, 1397-98 (2005) (arguing that citizens, not judges, are ultimately “the Constitution’s framers”); Charles R. Lawrence III, *Promises to Keep: We Are the Constitution’s Framers*, 30 *HOW. L.J.* 937, 945 (1987) (“If the Constitution has any unfulfilled promises they are those which we and others like us, who have gone before, have made to ourselves. It is we who must fight to give the due process and equal protection clauses a meaning that reflects our values.”).
40. See generally *PERSONAL JUSTICE DENIED*, *supra* note 34, at 27, 61, 187 (describing Executive Order No. 9066, which banished all Japanese Americans living on the West Coast of the United States to be sent to inland internment camps, and noting that many interned Japanese Americans enlisted in the armed forces to prove their loyalty to America).
41. See VICTOR KLEMPERER, *THE LANGUAGE OF THE THIRD REICH: LTI—LINGUA TERTII IMPERII: A PHILOLOGIST’S NOTEBOOK* 37 (Martin Brady trans., 2000).
42. See Martin Chalmers, *Preface* to VICTOR KLEMPERER, *I WILL BEAR WITNESS: A DIARY OF THE NAZI YEARS, 1942-1945*, at viii (Martin Chalmers trans., 1999).
43. See KLEMPERER, *supra* note 42, at 4 (recounting an encounter with a Gestapo officer, who referred to Klemperer’s Protestant baptism as “just a cover-up”); *id.* at 41 (“If he is surprised by the Gestapo during a visit, he wants to come here and pass as a friend of my Aryan wife.”).
44. See *id.* at 34 (“I think German, I am German—I did not give it to myself, I cannot tear it out of myself.”); *id.* at 51 (“I am fighting the hardest battle for my Germanness now. I must hold on to this: I am German, the others are un-German. I must hold on to this: The spirit is decisive, not blood. I must hold on to this: . . . [M]y baptism was *not* a comedy.”); see also Martin Chalmers, *Preface* to VICTOR KLEMPERER, *I WILL BEAR WITNESS: A DIARY OF THE NAZI YEARS, 1933-1941*, at xii (Martin Chalmers trans., 1998) (“What is there that embodies the democratic, the German, the humane ideal, Klemperer asked himself in his diary. For his own life, of course, he already knew the answer: It lay in the tireless curiosity, the questioning, the

notes changes around him—the university is nationalized and Jewish scholars are told to label their writings “translations from Hebrew.”⁴⁵ A professor who defends pacifism is classified as “politically unreliable,”⁴⁶ and Klemperer’s paycheck suddenly includes a deduction for “voluntary . . . charity,” commanded by the Third Reich.⁴⁷ Klemperer holds out hope, as a young veteran tells him, “Don’t be surprised if at some point you see me wearing . . . the swastika . . . I have to wear it—but this coercion doesn’t change us in any way.”⁴⁸

Then Herr and Frau K., friends from Klemperer’s elite Jewish circle, come calling. Over coffee, they announce that they are voting for Hitler’s plebiscite, on the ground that the Weimar system is “unworkable”⁴⁹ and that “‘the Führer’ . . . was undeniably a brilliant man.”⁵⁰ Klemperer explodes, pounding the table, rattling the coffee setting.⁵¹ He later regrets his rudeness to his guests when he finds out many of his friends are voting the same way.⁵² He writes: “Some kind of fog has descended which is enveloping everybody,” including “[p]eople who, without a doubt, must be regarded as intellectuals and who would generally be numbered among the quiet and independent thinkers.”⁵³

I imagine the delicate Dresden coffee cups rocking in their saucers, wobbling against the silver teaspoons, as Herr Klemperer pounds the table in his living nightmare. Signs of growing terror stand alongside denial and accommodation. In time, the first trains remove neighbors to concentration camps, and the remains of those who die of “heart trouble” are sent back.⁵⁴ The Jews who remain

generous standards of debate of his heroes Voltaire and Montesquieu and of the other thinkers of the Enlightenment.”).

45. KLEMPERER, *supra* note 41, at 29.

46. *Id.* at 34.

47. *Id.* at 35.

48. *Id.* at 32.

49. *Id.* at 37.

50. *Id.* at 38.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See id.* at 170–71 (“[W]ithin three months at the most, the community will receive a formal death certificate from Ravensbrück or Auschwitz. It will state the cause of death precisely, even with variations and an individual touch; it may say circumspectly ‘died of an inadequate cardiac muscle’ or ‘shot attempting to escape.’”); *see also* KLEMPERER, *supra* note 42, at 59 (describing a typewritten form from Weimar-Buchenwald Crematorium received by a friend of Klemperer after her husband was allegedly shot trying to escape, which noted that the urn containing his ashes was “at [his wife’s] disposal”).

try to recall the Hebrew words of the Kaddish. Most do not know the words.⁵⁵ They are German.⁵⁶ Then the trains leave with multitudes and no remains are returned. There is no longer a pretense of heart trouble or a concern for decent burial.⁵⁷

Klemperer writes of his china-rattling days: “I was not yet at all dulled, I was still so used to living in a state governed by the rule of law that I considered many things at the time to be the depths of hell which I would later deem to be at most its vestibule”⁵⁸

III. AND WE ARE NOT NAZIS

The war my father and Professor Klemperer barely survived shaped the rule of law in the last half of the twentieth century. “Who we are” became defined by who we are not: Nazis.⁵⁹ The embarrassment of Jim Crow, an American holdout of master-race ideology, was exploited by the civil rights movement, extracting major gains of formal equality.⁶⁰ Locking up citizens for trying to vote was not who we are.

55. Cf. KLEMPERER, *supra* note 41, at 187 (“[T]hen a Hebrew prayer for the dead was recited, in which everyone present took part insofar as they were able. The majority were not.”).

56. Cf. *id.* at 186 (“The only ones left behind are those living in mixed marriages, the most Germanized Jews who, for the most part, don’t belong any more to the Jewish community [T]hey have little or no knowledge of Jewish customs and rituals, and even less of the Hebrew language.”).

57. See *id.* at 187 (“During the final stage of the war, when wholesale gassings became routine, the polite return of these urns obviously stopped”).

58. *Id.* at 40.

59. See Eric Foner, *Who Is an American? The Imagined Community in American History*, 41 CENTENNIAL REV. 425, 436 (1997) (“Only the mobilization for World War II and the confrontation with Nazism . . . purged Americanism of the language of race.”).

60. Derrick Bell recognized that the need to legitimate the United States’ position as a bastion of liberty in the postwar period coincided with Black America’s push to end Jim Crow. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980).

During the Cold War, Mary Dudziak reported:

The U.S. hoped to save the world for democracy, and promoted its ideology and form of government as providing for greater personal freedom Yet as news story after news story of voting rights abuses, state-enforced segregation, and lynchings appeared in the world media, many questioned whether American constitutional rights and democratic principles had any meaning.

Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 118 (1988); see Dudziak, *supra*, at 107 (“[T]he apparent hypocrisy of a society professing equality but practicing segregation and other forms of racial discrimination furnishes justification and reason for the latent urge to rebel, and frequently leads to lasting bitterness or total rejection of the

In postwar decisions, our Supreme Court declared that:

We do not require citizens to salute the flag.⁶¹

We do not torture suspects.⁶²

We do not tell people whom they may marry⁶³ nor whom they may make love to.⁶⁴

We did not come to these positions easily, but in each case, we asked implicitly, “what would Hitler do?” And whatever the answer, we did the opposite, building a nation committed to democracy, human dignity, and equality. We gave liberty specific meaning by delineating what we would never do to human bodies, knowing that, within living memory, people who sipped from the finest china and called themselves civilized had tumbled into the practice of genocide.

The broad idea that human beings have inherent dignity impenetrable by the state is distillable, in my reading, from the doctrine called “substantive due process.”⁶⁵ It is a much-contested and doctrinally unstable concept.⁶⁶ Its most

American creed and system of government.” (quoting Brief for the United States at 59, *Henderson v. United States*, 339 U.S. 816 (1950)).

61. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (ending the compulsory flag salute and pledge of allegiance in public schools).
62. See *Rochin v. California*, 342 U.S. 165, 172, 174 (1952) (holding that police officers violated the Due Process Clause of the Fourteenth Amendment when they punched a man in the stomach in an attempt to make him vomit two capsules he had just swallowed, then took him to a hospital where an emetic was forced into his stomach against his will); *Brown v. Mississippi*, 297 U.S. 278, 281, 286 (1936) (holding that the Due Process Clause prevented prosecutors from using torture-coerced confessions against the defendants, including against one defendant who, after denying that he had committed a crime to the deputy sheriff, was hanged by a rope from a tree, taken down, hanged again, then tied to a tree and whipped until he confessed).
63. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (holding that state bans on same-sex marriage violate the Due Process and Equal Protection Clauses and establishing the constitutionality of same-sex marriage in all U.S. states and territories); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that state antimiscegenation statutes violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment).
64. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), with the pronouncement that “[t]he petitioners are entitled to respect for their private lives” and that “[t]he State cannot demean their existence or control their destiny by making private sexual conduct a crime”); see also *Loving*, 338 U.S. at 12.
65. See, e.g., *Lawrence*, 539 U.S. at 574 (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))).
66. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.4(e) (5th ed. 2012) (“Only time will tell whether . . . the Court will return to *Loch[n]jer*-era type of adjudication where the Justices will only approve laws

famous iteration was the conservative, prewar version, under which the right of businesses to operate without government regulation was seen as fundamental to ordered liberty.⁶⁷ This view gave way to the modern regulatory state, under which the right to do business is considered subordinate to the people's need for regulation in the public interest.⁶⁸

Substantive due process is considered a difficult doctrine to rely upon for justice, given its shifting interpretations and deeply politicized history.⁶⁹ It has failed us again and again, as when it ignored my father's liberty interest and sent him off to the horse stalls with only what he could carry in two hands. Although analyzed under the Equal Protection Clause, the order upheld in *Korematsu* represented not just a failure to afford equal treatment. It was also an intrusion into the heart of liberty: the right to freedom of movement; the right to live in one's home and seek fellowship in one's own community; the right to work and go to school; the right to use one's own property and pursue a calling; the right to recognition as a rights-bearing actor. A mass roundup of human beings, loading them onto trains and sending them off into the desert, should chill the bones of freedom-loving people. This is what I mean by substantive due process, and it goes beyond the injunction to treat like alike.

The doctrine of substantive due process can hold multitudes, and someday it will. It can proclaim not only the inviolability of each human's right to exist free from state harm but also the right to flourish with a reasonable expectation of state assistance.⁷⁰ The notion that torture is wrong because it is something a free and democratic nation must never do to human bodies is but a few sidesteps away from the notion of positive liberty. Allowing hunger, homelessness, a lack of medical care, or any number of tortures inflicted through the absence of the state is an embodied harm to human dignity. The distinction the law makes

where they believe that the end of the law, based on their personal values, justifies an intrusion on individual liberty.”); cf. Francis Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, 13 COLUM. L. REV. 37, 44-46 (1913) (“The doctrine of fundamental law was a vague and unstable doctrine for the court to rest its decisions upon.”).

67. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (characterizing the *Lochner* era as a time when it was “common practice for this Court to strike down economic regulations”).
68. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 213-46 (1992) (offering a complexified, legal realist analysis of the bureaucratic state).
69. See ROTUNDA & NOWAK, *supra* note 66; Bird, *supra* note 66.
70. See Mari Matsuda, *The Next Dada Utopian Visioning Peace Orchestra: Constitutional Theory and the Aspirational*, 62 MCGILL L.J. 1203 (2017) (arguing for a constitutional interpretation of liberty that encompasses positive rights, including the right to art); see also ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 2-3* (1994); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987) (arguing for a constitutional right to an income sufficient for “survival” because the right to subsist is a fundamental right).

between action and inaction⁷¹ will someday give way to a principle the law has long understood: we intend the foreseeable consequences of our choices and we are responsible for them. The commentators who note the shifting and slippery interpretation of substantive due process miss the point that the entire Constitution, as legal realists and critical legal scholars long ago noted, is a humanmade document subject to epic battles of interpretation.⁷²

This interpretive fight is not pointless. I argue the opposite: we must decide who we really are, what we stand for, what we will allow, and how much we are accountable to one another. The resolution of these questions may well determine whether the human species survives on planet Earth.

IV. A CRITICAL RACE READING OF *KOREMATSU*

Constitutional interpretation forges our national identity and gives it our intersectional multiplicity. The need for a legalized identity derives from the absence of a common culture. A nation built on exploitation and colonization, legitimized through the doh-si-doh of exclusion and assimilation, must turn to law as its centripetal force. The United States has no state religion, no unitary culture, and increasingly, no agreement on norms from table manners to presidential prevarication. Cases like *Brown v. Board of Education*⁷³ or *Roe v. Wade*,⁷⁴ in which law asserts equality ahead of the dominant culture's attitudes, locates each outsider group's struggle for liberation within the ideological beating heart of the Republic. Law binds us together, law defines us, law materializes our fight for just definitions.

In 1944, my father walked out of the woods at Vosges, stunned by the shrunken size of his company. "It's supposed to be a lot of guys," he later told me. Not just the five or ten who straggled out. The higher-ups thought the troops weren't following orders when so few showed up for formation after the

71. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment only regulates state action and that Congress is not empowered to create legislation regulating private invasions of civil rights).

72. See Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 623-30 (1984) (discussing the legal realist and critical legal studies project of "descriptive debunking" of the Supreme Court's interpretations of the Constitution); see also DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 20-47 (2d ed. 1980) (discussing the slavocratic origins of the U.S. Constitution and its inherently political interpretive history).

73. 347 U.S. 483, 495 (1954) (holding that "separate but equal" racially segregated public schools are inherently unequal and violate the guarantees of the Equal Protection Clause).

74. 410 U.S. 113, 153 (1973) (holding that the right to privacy encompasses a woman's decision to terminate her pregnancy).

legendary rescue of the lost battalion. Where was everyone? Almost everyone was either dead or wounded.⁷⁵ This was the price the Nisei soldiers paid for the end of anti-Asian naturalization bans that kept the right of citizenship from their immigrant parents. Their blood inscribed their fight over the meaning of those words on paper that we call the Constitution of the United States of America.

Most of the Nisei veterans of World War II were gone by 2018, when the U.S. Supreme Court formally acknowledged the wrong of locking up U.S. citizens because of their race. The Court facially repudiated *Korematsu*⁷⁶ in the same case in which it allowed the government to rebrand its Muslim ban as an order for “Enhanc[ed] Vetting Capabilities.”⁷⁷ The forty-fifth President, who had campaigned on the promise of a Muslim ban and who continued to recite anti-Muslim propaganda,⁷⁸ made no secret of asking his lawyers to excise offending language while continuing to pursue his avowed goal.⁷⁹ Granting constitutional imprimatur to this blatant wink-and-rewrite was not a repudiation of *Korematsu*; it was the opposite. It reenacted the *Korematsu* majority’s complete deference to

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75. See generally LYN CROST, HONOR BY FIRE: JAPANESE AMERICANS AT WAR IN EUROPE AND THE PACIFIC 185 (1994) (describing the woods of Vosges in France as a mountainous region that was freezing cold and thick with trees and heavy fog); CROST, *supra*, at 197 (relating that the 100th/442nd Regimental Combat Team suffered more than 800 casualties, bringing the Nisei 3rd battalion, Company K down to seventeen riflemen and Company I to eight); THOMAS D. MURPHY, AMBASSADORS IN ARMS: THE STORY OF HAWAII’S 100TH BATTALION 239-44 (1954) (recounting the rescue of the lost battalion during late October 1944).
76. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority *Korematsu* was gravely wrong the day it was decided . . .”).
77. Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).
78. See *Trump*, 138 S. Ct. at 2434-36 (Sotomayor, J., dissenting) (tracing numerous statements made by Trump on the campaign trail, including that he intended to ban Muslims from entering the United States, and describing his statement one month before signing Executive Order No. 13,769 that he would not “rethink” his “plans to create a Muslim registry or ban Muslim immigration”).
79. *Cf. id.* at 2436 (“As he signed [the order entitled “Protecting the Nation from Foreign Terrorist Entry into the United States”], President Trump read the title, looked up, and said, ‘We all know what that means.’”); *id.* (quoting a key Trump adviser, who stated, “[W]hen [Donald Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”). Justice Sotomayor’s dissent cites several Trump tweets that made the real intention behind the travel ban abundantly clear. See, e.g., *id.* at 2437 (“People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!” (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017), <https://twitter.com/realDonaldTrump/status/871674214356484096> [<https://perma.cc/W6X2-S9AQ>])).

executive claims of necessity, ignoring copious evidence that animus, not national security, was the government's motivation.⁸⁰

A few decades earlier, another court more clearly understood what repudiation looks like. When Judge Marilyn Hall Patel surprised a packed courtroom with the rare act of announcing her decision from the bench immediately upon the close of argument in the *Korematsu* coram nobis case,⁸¹ some witnesses quietly wept, watching a federal judge acknowledge what Japanese Americans had claimed for years: the U.S. government lied about military necessity when it branded Japanese Americans traitors.⁸² Japanese Americans know in the bone what group defamation feels like. They know the Muslim ban is exactly the same thing.⁸³

80. See *id.* at 2448 (“By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”).

81. See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (setting aside the conviction of Fred Korematsu on the ground that the U.S. government had deliberately misled the Supreme Court when it stated that the internment of Japanese Americans was required for national security); see also LORRAINE BANNAL, *ENDURING CONVICTION* 184-89 (2015) (“Judge Patel shuffled her papers, and then you could tell . . . she had something prepared, so she’s gonna rule from the bench . . . [A]t that moment, I could feel the intense energy in the room. It felt to me like everything was vibrating.” (quoting Eric Yamamoto)).

82. For a discussion of *Korematsu* and the claim of national security, see generally ERIC YAMAMOTO, *IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY* (2018); and Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 *YALE L.J.F.* 688 (2019). See also *Korematsu*, 584 F. Supp. at 1420, which states that *Korematsu* “stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees”). Lorraine Bannal, one of the attorneys for *Korematsu* in his coram nobis litigation, recalls the scene as those gathered in the courtroom realized that her client’s conviction had finally been thrown out: “Smiles, hugs, and celebration filled the courtroom, mixed with tears of remembering and the silent, private, release of pain that had been carried for decades.” BANNAL, *supra* note 81, at 187.

83. See, e.g., Brief of *Amicus Curiae* the Japanese American Citizens League in Support of Respondents at 6-27, *Trump*, 138 S. Ct. 2392 (urging the Court to learn from the history of Executive Order No. 9066, which interned Japanese Americans on the West Coast, and its parallels to the Trump Administration’s travel ban in its “sweeping and senseless scope,” invocation of “the specter of an ill-defined threat to national security to justify the exclusion,” and use of “intolerance and bigotry, not a genuine concern for national security,” to justify the exclusion).

Korematsu, like *Brown*,⁸⁴ like *Meritor Savings Bank v. Vinson*,⁸⁵ like *Obergefell v. Hodges*,⁸⁶ like *Griggs v. Duke Power Co.*,⁸⁷ is a case asking us to decide whether we are a nation driven by hatred to exclude and defame or whether we will define equality in grander and more aspirational terms than the framers could have ever imagined. The men who gathered in Philadelphia were bound by the racism, sexism, and homophobia of their times. Their quill pens labored to form a cohesive nation while keeping the pact with the devil that was human bondage.

We are not imprisoned in their reality as we take on the deeply contested process of becoming a nation that will transcend the violence of its origin. We will do this, or the nation will end.

As a critical race theorist, I believe racism is a structural system intertwined, inevitably, with other forms of subordination that work synergistically to benefit the few who have power over the many.⁸⁸ This system includes cultural practices of disregarding harm that culminate in blood on the floor of a church, a synagogue, or a school.⁸⁹ We cannot liberate ourselves from one form of domination

84. 347 U.S. 483 (1954).

85. 477 U.S. 57 (1986) (holding that sexual harassment creating a hostile or abusive work environment is a violation of Title VII).

86. 135 S. Ct. 2584 (2015) (striking down state bans on same-sex marriage).

87. 401 U.S. 424 (1971). See generally Mari Matsuda, *Beyond, and Not Beyond, Black and White: Deconstruction Has a Politics*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 393, 395 (Francisco Valdes et al. eds., 2002) (“Professor Lawrence speaks of *Griggs* as the doctrinal culmination of the Civil Rights struggle, a high point before we sank back to where we are now The *Griggs* case says that if we see an end result of racial exclusion, we will presume that racism is there, and we’re not going to require proof that someone intended to get to this racist place.” (citation omitted) (citing Charles R. Lawrence III, *Foreword to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY*, *supra*, at xiv)).

88. See Charles R. Lawrence III, Mari J. Matsuda, Richard Delgado & Kimberlè Williams Crenshaw, *Introduction to WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7* (1993) (“The interests of all people of color necessarily require not just adjustments within the established hierarchies, but a challenge to hierarchy itself. This recognition of intersecting forms of subordination requires multiple consciousness and political practices that address the varied ways in which people experience subordination.”).

89. Church and school shootings in recent years are sadly too numerous to list exhaustively here, but the most publicized events have included the Sandy Hook Elementary School shooting in Newtown, Connecticut; the Parkland, Florida, high school shooting; the Charleston, South Carolina, church shooting; and the Sutherland Springs, Texas, church shooting. See, e.g., Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, 1553-79 (2014) (describing the Sandy Hook Elementary School mass shooting and the adequacy of legislative and administrative responses and examining the massacre’s significance in the formation of gun control laws); Lindsay Bever, *‘I’m Just a Sociopath,’ Dylann Roof Declared After Deadly Church Shooting Rampage, Court Records Say*, WASH. POST (May 17, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/05/17/im-just-a-sociopath-dylann-roof-declared-after-deadly-church-shooting-spree-court-records-say> [https://perma.cc/6XS7-64RQ]; David Montgomery et al., *Gunman Kills at Least 26 in Attack on Rural Texas Church*,

while leaving another in place, and the processes for both maintaining and fighting domination are, in significant part, ideological, with a subpart, legal. Law is constitutive of the culture that, in turn, shapes our institutions and practices. Just law, derived from struggle, alters culture and thereby moves us toward just realities.⁹⁰ For this reason, critical race scholars have always argued for a dual stance toward the rule of law, both critiquing claims of neutral principles and demanding rights for the dispossessed.⁹¹ The significance of *Korematsu* on its anniversary is that the work of overruling it is undone and that we don't have much time left to end the process of organizing political life around taking, smashing, and dominating.

V. VIOLENCE IS (NOT) WHO WE ARE

Only myth tells us who we would become; only history can tell us how hard it will really be to become that.

– Robert Cover⁹²

On the first day of my Feminist Legal Theory class, I always predict aloud that a woman will die from intimate-partner violence in our small state before we finish the semester. Once, it happened in the week after I made the prediction, and the victim was a young lawyer with whom my students could easily

N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/us/church-shooting-texas.html> [<https://perma.cc/NAE4-2PFD>]; Lisa Marie Segarra et al., *Sheriff's Office Had Received About 20 Calls Regarding Suspect: The Latest on the Florida School Shooting*, TIME (Feb. 14, 2018), <http://time.com/5158678/what-to-know-about-the-active-shooter-situation-at-florida-high-school> [<https://perma.cc/JM7Y-467D>].

90. Cf. Aviam Soifer, *Covered Bridges*, 17 YALE J.L. & HUMAN. 55, 59-60 (discussing Robert Cover's belief that "overriding principles of justice could be discerned and advanced through 'committed social behavior'" and his assertion that the actions of protestors could be "jurisgenerative" (quoting Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 47 (1983))).

91. Critical race theory originated a friendly response to critical legal studies called the critique of the critique of rights, with salvos such as:

There are times to stand outside the courtroom door and say, "This procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times to stand inside the courtroom and say, "This is a nation of laws, laws recognizing fundamental values of rights, equality and personhood." Sometimes, as Angela Davis did, there is a need to make both speeches in one day.

Mari Matsuda, *When the First Quail Calls*, in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 6 (1996).

92. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 190 (1985).

identify.⁹³ We were a bit stunned that the lesson of gendered violence came so soon, so close.

If we know that women die, regularly, methodically, brutally from intimate-partner violence, why don't we treat this as an emergency? Every woman who reads this can recall times she has had to strategize how to safely navigate public space given the reality of rape culture. Simple things like parking in a parking garage at night or using an unfamiliar public restroom require personal safety calculations. The fact that women regularly are unsafe in their lives deserves to be treated with the same significance as other issues that merit an executive order and acknowledgement as a threat to national security.

What would it look like to make women's safety a national priority—to create harassment-free streets, rape-free cities, and violence-free families? To live in a woman's body is to know how desperately we need this.

Our inaction in the face of obvious need is learned. There are places we learn to treat someone as less than valuable.⁹⁴ Patriarchy is one school, homophobia is another; racism, of course, tags along with the armory tracing back to the bull-whip and the lynching tree. Watch how the first boy who breaks rank to protest the objectification of women is treated in the locker room. The other boys are watching and learning that demeaning others is the price of membership in the dominance club. The boy who learns this well is the one who will perpetuate rape culture. This means not only that he will enact harm to women's bodies but that he is prepared to perpetuate every injustice. He will walk by the blue-tarp tent on the sidewalk where a family is living and sneer in disgust. He will call poverty a choice. He will drop a bomb before he learns the ways of diplomacy. He will say "build a wall to keep out those animals." If you think I refer here to the current President, I do not. I refer to his father, the U.S. patriarchy, who has defined who we are since the time of the middle passage.

93. Celestial Cassman, thirty-five, was killed in "an especially heinous, atrocious, or cruel manner" after an argument with her boyfriend, according to the Maui County prosecutors. See Complaint at 1-2, *Hawaii v. Galaway*, No. 2P411-00289 (Haw. Dist. Ct. 2d. Cir. Sept. 6, 2011), <http://www.hawaiinewsnow.com/story/15415040/suspect-charged-in-maui-murder-case> [<https://perma.cc/BY6G-48EB>] (linking to the charging documents); Mike O'Brien, *Man Who Jumped 100ft Cliff to Flee Cops Faces Murder Charge After City Attorney Companion's 'Heinous, Cruel' Death on Vacation*, DAILY MAIL (Sept. 8, 2011, 10:43 PM), <https://www.dailymail.co.uk/news/article-2035323/City-attorney-dies-heinous-cruel-murder-Hawaiian-vacation.html> [<https://perma.cc/PM4J-W6V4>] ("At least one witness tried to intervene, but was told by Galaway that everything was 'fine.' The female witness told police that Galaway began lifting Cassman up and slamming her body to the roadway several times.").

94. Cf. Mari J. Matsuda, *Is Peacemaking Unpatriotic?: The Function of Homophobia in the Discursive World*, 11 J. HATE STUD. 9 (2013) (discussing homophobia as a potential driver of other forms of subordination).

When I assigned Dorothy Roberts's *Killing the Black Body*,⁹⁵ my students could barely stand to read the accounts of women raped and beaten in the time of slavery. Roberts described the overseer digging a depression for a woman's pregnant belly so he could flog her, facedown, bloodying her back without harming the unborn child considered property of the master.⁹⁶

When the horror of slavery ended, the participants in this practice of torture did not go away, and the practice continued during the long reign of Jim Crow and lynching. The police officer who shoots a child today out of fear of Blackness inherits an ingrained culture of violence against Black bodies.⁹⁷

We will never do what we need to do to end this violence until we understand its broad and resilient origin story. Assault on the threatening "other" was the justification for massacres that depopulated a continent so that newcomers could take over.⁹⁸ In California, blood soaks the ground from the nineteenth- and twentieth-century pogroms directed against Mexicans⁹⁹ and Chinese people.¹⁰⁰ This history is not widely known. My students are often surprised when I use the words "lynching" and "Chinese" in the same sentence until they read the history.¹⁰¹

Alongside the history of slaughter lives the history of resistance to it. When U.S. troops came upon native women and children at Sand Creek, huddled under the U.S. flag and the white flag of surrender, Captain Silas Soule refused the order to fire and sent a report to Washington condemning his own commanding

95. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

96. *Id.* at 39-40 (citing Michael P. Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault?*, 47 J. SOUTHERN HIST. 493, 513 (1990)).

97. *Cf.* Mari Matsuda, *Planet Asian America*, 8 ASIAN L.J. 169, 174-77 (2001) (recounting a legacy of violence against Black Americans dating from the Reconstruction period, including instances in which police encouraged or participated).

98. *See generally* DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* (1992).

99. *See, e.g.*, Richard Griswold del Castillo, *The Los Angeles "Zoot Suit Riots" Revisited: Mexican and Latin American Perspectives*, 16 MEXICAN STUD. 367, 370 (2000) ("The [Zoot Suit] riots lasted more than ten days and resulted in the beatings of hundreds of Mexican youth. That no one was killed was a miracle.").

100. *See, e.g.*, Paul R. Spitzerri, "Shall Law Stand for Naught?": *The Los Angeles Chinese Massacre of 1871 at Trial*, 3 CAL. LEGAL HIST. 185, 185-88 (2008) (describing "a night of horror" that led to the deaths of eighteen Chinese people in Los Angeles, California, in 1871).

101. *See generally* William R. Locklear, *The Celestials and the Angels*, in *ANTI-CHINESE VIOLENCE IN NORTH AMERICA* (Roger Daniels ed., 1978) (documenting incidences of anti-Chinese violence during the nineteenth century); Roy T. Wortman, *Denver's Anti-Chinese Riot, 1880*, in *ANTI-CHINESE VIOLENCE IN NORTH AMERICA*, *supra*, at 275, 284-85 (describing a mob that brutally murdered Sing Lee, a Denver laundryman, in 1880).

officer for the ensuing slaughter.¹⁰² Meanwhile, back east, Harriet Tubman led an expedition down the Combahee River to gather up the enslaved and lead them to freedom.¹⁰³ At every dark hour, the resisters imagined a different way, leaving a placeholder for a new national identity that could supplant the legacy of violence.¹⁰⁴

This record of resistance is remade in each generation. The archive of ads offering rewards for runaways who had escaped enslavement shows the courage and ingenuity of the Black southerners who used their own bodies to demarcate an inextinguishable light of freedom.¹⁰⁵ That light is carried with a sense of duty by young people today working to stop police violence.¹⁰⁶

I continue to use the rhetoric of “who we are” and the legal language of the Bill of Rights. Klemperer’s diaries, so strangely familiar given the creeping fascism we have lived with since the last presidential election, are a reminder that we could go from uneasy coffee klatch to losing every right enumerated in our Constitution overnight.¹⁰⁷

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102. See ARI KELMAN, *A MISPLACED MASSACRE: STRUGGLING OVER THE MEMORY OF SAND CREEK* 12, 22-23 (2013) (“At Sand Creek, Soule had refused to commit his troops to the fight and had later raised questions about the violence. He suggested that the blood-shed had not been a triumph, as Chivington and his loyalists insisted, but a tragedy: a massacre of peaceful Indians.”).
103. See CATHERINE CLINTON, *HARRIET TUBMAN: THE ROAD TO FREEDOM* 163-74 (2004).
104. See, e.g., IDA B. WELLS, *SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892-1900* (Jacqueline Jones Royster ed., 1997) (detailing Ida B. Wells’s efforts to document and publicize hundreds of lynchings in the United States as part of a campaign to end the widespread practice in the South). In Wells’s words, “When the Christian world knows the alarming growth and extent of outlawry in our land, some means will be found to stop it.” *Id.* at 27 (citing IDA B. WELLS, *A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892-1893-1894* (1895)).
105. Thousands of advertisements were published during the time of slavery by masters offering rewards for runaways with descriptions of the appearance and character of the escapees, often giving insight into the ingenuity and motivation required to abscond with oneself to freedom. For example, a man named Bob, who escaped from the state of Virginia, was described by his master as “an extraordinary sawer, a tolerable good carpenter and currier [leatherworker], pretends to make shoes, and is a very good sailor He can read and write; and, as he is a very artful fellow, will probably forge a pass.” *Virginia Runaway Slave Advertisements, 1745-1775*, NAT’L HUMAN. CTR. 2 (2007), <http://nationalhumanitiescenter.org/pds/maai/enslavement/text8/virginiarunawayads.pdf> [<https://perma.cc/VXA5-PHEJ>].
106. The “our duty” pledge is regularly recited at Black Lives Matter actions. For images of the recitation of the pledge, see *WHOSE STREETS?* (Magnolia Pictures 2017). Cf. ASSATA SHAKUR, *ASSATA: AN AUTOBIOGRAPHY* 52 (1987) (“It is our duty to fight for our freedom. It is our duty to win. We must love each other and support each other. We have nothing to lose but our chains.”).
107. Cf. DAVID CESARINI, *BECOMING EICHMANN: RETHINKING THE LIFE, CRIMES, AND TRIAL OF A “DESK MURDERER”* 16-17 (2004) (“Eichmann was not insane He was educated to

We are a nation with both a legacy of violence and a strong counterlegacy of humane aspiration. Our regular attempts, since the drafting of the Constitution, to stand for something more than our defining reality of violence are our paradox, our gift, and our obligation.

Watch and commit to memory what you see. While Nazis march in the streets proclaiming white power,¹⁰⁸ crowds come to cheer a President who calls immigrants criminals.¹⁰⁹ The language of dehumanizing hate is deployed with

genocide and chose to put what he learned into operation . . . [I]t is not necessary to be abnormal to become a practitioner of genocide.”).

108. At the 2017 Unite the Right rally in Charlottesville, Virginia, many white nationalists carried flags with swastikas and other Nazi symbols; they chanted Nazi slogans like “blood and soil” and shouted, “You will not replace us/Jews will not replace us!” *Deconstructing the Symbols and Slogans Spotted in Charlottesville*, WASH. POST (Aug. 18, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-videos> [<https://perma.cc/U3CN-DDB8>]; see also Cristina Maza, *Moments White Supremacists, Neo-Nazis and the Alt-Right Marched on America in 2017*, in *Images*, NEWSWEEK (Dec. 27, 2017, 1:04 PM EST), <https://www.newsweek.com/white-supremacists-neo-nazis-alt-right-march-america-2017-760514> [<https://perma.cc/A7JY-VN6C>] (recounting various white supremacist and alt-right events held in 2017, including a speech by Richard Spencer where a member of the crowd sported swastikas on his clothing and a White Lives Matter rally where white supremacists made a Nazi salute to antagonize counterprotestors).
109. For documentation of continued attendance at Trump rallies, see, for example, Julie Hirschfeld Davis, *At Rally in Nashville, Trump Links Democrats to MS-13*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/politics/trump-rally-nashville-ms-13.html> [<https://perma.cc/27PX-B3ZL>], estimating the attendance of President Trump’s May 29, 2018, rally in Nashville, Tennessee, to be around 5,500 people. For one occasion on which President Trump characterized immigrants as criminals, see Donald Trump, *Announcement of Presidential Campaign (June 16, 2015)*, in Amber Phillips, *‘They’re Rapists.’ President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated> [<https://perma.cc/ES9H-73BU>], during which Trump stated, “When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.” See also Stephen Collinson, *Trump Shocks with Racist New Ad Days Before Midterms*, CNN (Nov. 1, 2018, 8:53 AM), <https://www.cnn.com/2018/10/31/politics/donald-trump-immigration-paul-ryan-midterms/index.html> [<https://perma.cc/9G8A-VBY7>] (“In the most racially charged national political ad in 30 years, President Donald Trump and the Republican Party accuse Democrats of plotting to help people they depict as Central American invaders overrun the nation with cop killers.”); Jeremy W. Peters, *How Trump-Fed Conspiracy Theories About Migrant Caravan Intersect with Deadly Hatred*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/politics/caravan-trump-shooting-elections.html> [<https://perma.cc/QKL2-FKTW>] (recounting the President’s comments that “[c]riminals and unknown Middle Easterners are mixed in” with the caravan; that the caravan contained “[m]any gang members and some very bad people”; and that Democrats “want to open America’s borders and turn our country into a friendly sanctuary for murderous thugs from other countries who will kill us all”).

THIS IS (NOT) WHO WE ARE

the posture of the batterer. The clear intention is to keep an old vision: white supremacy, male domination, putting others in their place, exploiting the planet, revving up the war machine. This obvious move to fascist posturing calls on citizens of goodwill to be the opposite – explicitly, aggressively, and joyously.

The opposite of the strongman's culture of domination is love, sharing, compassion, creativity, and play. The opposite of patriarchal, heterosexist, racist degradation is the uplifting of each one of us as beautifully human and entitled to thrive. Since we know we are not them, we may now speak openly of a world in which basic human needs are a collective responsibility: quality housing for all, clean air and water, universal health care, free college, and freedom from violence in and out of the home. These clear-eyed demands have entered the political conversation after years of timidly asking for a little less harm. The legal containers of liberty should both restrain the state from enacting harm and require the state to act to end harm. The ultimate repudiation of *Korematsu* is a deep commitment to human dignity.

VI. TO OVERTURN *KOREMATSU*

Korematsu came out of fear: a nation at war,¹¹⁰ a long habit of hating Asians,¹¹¹ a revved-up propaganda machine,¹¹² an economic threat.¹¹³ Saying “never again” to racially motivated constitutional annihilation of citizenship means unlearning every practice and ideology of fascism and dismantling every

110. See Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigation*, in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 755-56 (Hyung-Chan Kim ed., 1992) (“Professor Eric Yamamoto also criticized the Court’s lax judicial review of the government’s claim of military necessity and asserted that the same deference to military judgment which upheld these World War II military orders constitutes a continued threat to civil liberties today.” (citing Eric Yamamoto, *Korematsu Revisited – Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986))).

111. See, e.g., Immigration Act of 1924, § 11(d), 43 Stat. 153, 159 (enacting the Asian Exclusion Act, which prevented citizens of Asian countries from immigrating to the United States). John S.W. Park describes how hatred for Asian migrants led to many concrete measures to prevent them from mixing with the rest of the population in the late nineteenth century:

Lawmakers in California made no distinctions in their hatred for Asian migrants. Since 1885, acting on the request of urban school districts, especially San Francisco, the State of California passed blunt, race-conscious rules: school districts could . . . “establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established Chinese or Mongolian children must not be admitted into any other schools.”

JOHN S.W. PARK, *ELUSIVE CITIZENSHIP: IMMIGRATION, ASIAN AMERICANS, AND THE PARADOX OF CIVIL RIGHTS* 110 (2004) (citing CHARLES McCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 142 (1994)); see also MAXINE SCHWARTZ SELLER, *TO SEEK AMERICA: A HISTORY OF ETHNIC LIFE IN THE UNITED STATES 199-203* (1988) (discussing how the depression of the 1890s shaped the “agitation against Asian-Americans”); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, in *A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW* 566 (Timothy Davis et al. eds., 2001) (noting that the “horrendous treatment of Chinese immigrants in the 1800s by federal, state, and local governments, as well as by the public at large, represents a bitter underside to U.S. history”).

112. A cartoon drawn by Theodore Seuss Geisel, known best by his pseudonym “Dr. Seuss,” illustrates typical World War II anti-Japanese-American propaganda, depicting a line of slant-eyed Japanese Americans receiving TNT and waiting for the “signal from home.” See Theodore Seuss Geisel, “*Waiting for the Signal from Home . . .*,” in *YELLOW PERIL!: AN ARCHIVE OF ANTI-ASIAN FEAR* 255 (John Kuo Wei Tchen & Dylan Yeats eds., 2014).

113. See Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 37-38 (1998) (“[T]he ‘Alien Land Laws’ enacted in western states in the second and third decades of the twentieth century . . . linked the virulent nineteenth-century Sinophobia that culminated in the 1882 Chinese Exclusion Act with the mass internment of Japanese Americans in the mid-twentieth century.” (footnote omitted)).

material girder—including the daily unease workers live with in a winner-take-all economy.

The work of turning a cruel nation into a community of care is not impossible. Everywhere, the work is happening. Legions of feminist domestic violence workers have taught us how to end violence to women’s bodies. They tell us we won’t end violence without ending poverty.¹¹⁴ Women need options—education, housing, a living wage, childcare, paid family leave—in order to escape violence. And in the families where, “I love you, I just want the violence to stop,” has a chance of a good outcome, the helping hand of support, therapy, counseling, drug rehabilitation, and dignifying, intensive, culturally informed intervention is something we must demand for every family that wants it.

If we learn to do that at the ground level, we will become a nation that can act humanely at the macro level. Our lack of care for the chaos and poverty we have sown in other countries comes home. Investment in and restoration of countries we have harmed through war and exploitation would do more than any wall to reduce the refugee crisis, more than any drone attack to end the roots of terrorism. The hard work of taking hate out of our hands, dropping the weapons, and admitting our vulnerability and pain is the method of repair that can save our house. What we ask the batterer to do in order to stay in his home, we can ask ourselves to do as a nation.

We are learning the practice of evicting the batterer mentality. The Muslim ban brought hundreds to the airports in a citizen’s emergency proclamation of outrage.¹¹⁵ Seeing immigrant children torn from their parents brought the

114. For an overview of how domestic violence and poverty are interwoven, see Jill Davies, *Policy Blueprint on Domestic Violence and Poverty*, NAT’L RES. CTR. ON DOMESTIC VIOLENCE 4-6 (Mar. 2002), https://vawnet.org/sites/default/files/materials/files/2016-09/BCS15_BP.pdf [<https://perma.cc/D829-P9YS>]. The Asian Pacific Institution on Gender-Based Violence has integrated tools for economic security in its A to Z Advocacy Model, and several Asian Pacific Islander domestic violence agencies are working to design programming to teach women economic literacy, decision-making, and money management skills. See Chic Dabby, *A to Z Advocacy Model: Asians and Pacific Islanders Build an Inventory of Evidence-Informed Practices* 32 (2017), <https://www.api-gbv.org/resources/a-z-advocacy-model-report> [<https://perma.cc/8FZ5-6HDQ>]; see also Nat’l Res. Ctr. on Domestic Violence, *Program Profile: Economic Justice Project*, DOMESTIC VIOLENCE EVIDENCE PROJECT, <https://www.dvevidenceproject.org/focus-areas/services-to-victims/program-and-practice-reviews/program-profile-economic-justice-project> [<https://perma.cc/R5KN-U4TX>].

115. See, e.g., James Doubek, *Photos: Thousands Protest at Airports Nationwide Against Trump’s Immigration Order*, NPR (Jan. 29, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order> [<https://perma.cc/YA7V-DRFA>]; Lauren Gambino et al., *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, GUARDIAN (Jan. 29, 2017), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports> [<https://perma.cc/E6EK-GT3G>].

stroller brigades to Congress.¹¹⁶ My old neighbors in Shepherd Park, D.C., headed straight down North Capitol Street to get arrested.¹¹⁷ People made constitutional interpretation their own responsibility, saying, “You can’t do this, this is not what my America does, we won’t let you get away with this.” Since January 20, 2017, millions have hit the streets in a historically unprecedented showing of opposition to hateful governance.¹¹⁸

The question is joined. Peace-loving humanists take to the streets for democracy, while the backlash washes authoritarian bullies onto temporary thrones. The worldwide rise of racist nationalism has foregrounded the most immature versions of statecraft. The language is from the time of catapults and iron-studded clubs: We are better; they are bad. We deserve; they do not. Why waste time with the rule of law, the bully reasons, when evil gathers on the horizon?

We need better tools than the club and the snarl, given that we are at midnight on the global warming clock.¹¹⁹ In spite of all the inhumanity we are forced to witness, despite the carnage marking nearly every page of our history books, I know the vast majority of Americans would stop to help if they saw a child injured in the street. We are not a species that walks away when we encounter a

116. See Tim Arango & Kayla Cockrel, *Marches Across the U.S. Protest Separation of Migrant Families*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/protest-marches-family-separation.html> [<https://perma.cc/N598-GMLK>]; Caroline Simon & Marina Pitofsky, ‘Where Are the Children?’ Women March on Washington in Act of ‘Civil Disobedience’ to Protest Family Separations, USA TODAY (June 28, 2018), <https://www.usatoday.com/story/news/2018/06/28/immigrant-children-women-march-protest-family-separation/742336002> [<https://perma.cc/QZ5Y-6QJ9>].

117. See generally Sophia Barnes & Chris Cioffi, *Celebrities, Activists, Demonstrators Decry Zero-Tolerance Immigration Policies Outside the White House*, NBC WASH. (June 30, 2018), <https://www.nbcwashington.com/news/local/Immigration-Protests-Planned-in-DC-and-Beyond-486727761.html> [<https://perma.cc/ZJW3-LXXC>] (reporting that the U.S. Capitol Police said officers arrested about 575 protesters and charged them with unlawfully demonstrating).

118. See, e.g., Robert Booth & Alexandra Topping, *Two Million Protest Against Trump’s Inauguration Worldwide*, GUARDIAN (Jan. 22, 2017), <https://www.theguardian.com/lifeandstyle/2017/jan/22/two-million-protest-against-trumps-inauguration-worldwide> [<https://perma.cc/933Q-EQZF>] (“[U]p to two million people around the world, mostly women, staged protests against the new US president and proclaimed the birth of a new political movement.”); *Donald Trump Protests Attract Millions Across US and World*, BBC NEWS (Jan. 21, 2017), <https://www.bbc.com/news/world-us-canada-38705586> [<https://perma.cc/29TR-KX7B>] (“Millions of protesters have taken to the streets of cities in the US and around the globe to rally against the new US President Donald Trump The biggest US rally was in the capital Washington, which city officials estimated to be more than 500,000-strong.”).

119. See *2018 National Climate Assessment*, U.S. GLOBAL CHANGE RES. PROGRAM, <https://nca2018.globalchange.gov/> [<https://perma.cc/45RE-VCSQ>]. See generally NAOMI KLEIN, NO IS NOT ENOUGH: RESISTING TRUMP’S SHOCK POLITICS AND WINNING THE WORLD WE NEED 69-70 (2017) (“The latest peer-reviewed science tells us that if we want a good shot at protecting coastal cities in my son’s lifetime . . . then we need to get off fossil fuels with superhuman speed We are almost at midnight on the climate clock.”).

child crying and alone. For every cruelty we have committed as a nation, there was resistance and condemnation from those who refused to turn away.

The true overruling of *Korematsu* is happening now. Those of us who want to live peaceful lives governed by humane practices and reliable guarantees of personhood are organizing ourselves to take back our country. The mistake in this historical moment is to ask for too little. There is no small tweak that can stop the march to annihilation. We need and will make a hugely generous nation that will treat violence against women as an emergency and call child incarceration an abomination. A nation that, mature in its recognition of mutual humanity and astute in its willingness to change, will rise to the challenge of dying reefs, killer hurricanes, and massive crop failure. We will no longer see power *over* as better than power *with*.

Our Constitution, with its intergenerational pledge to secure the blessings of liberty for ourselves and our posterity, is an invitation to do this work. Whose liberty, defined how? Everyone's. Every. Single. One. Upheld, promoted, and valued, so we can walk together with trust and loving determination as the seas rise around us.

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